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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

DEVAN GRINER,

Plaintiff,

vs.

JOSEPH R. BIDEN, in his official capacity as the President of the United States of America; the UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services; CENTERS FOR MEDICARE AND MEDICAID SERVICES; CHIQUITA BROOKS-LASURE, in her official capacity as Administrator for the Centers for Medicare and Medicaid Services; MEENA SESHAMANI, in her official capacity as Deputy Administrator and Director of Center for Medicare; and DANIEL TSAI, in his official capacity as Deputy Administrator and Director of Center for Medicaid and CHIP Services,

Defendants.

Case No. 2:22-cv-00149-DAK

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S NOTICE OF
SUPPLEMENTAL AUTHORITY**

Hon. Dale A. Kimball

Plaintiff's Notice of Supplemental Authority, ECF No. 40, cites a recent guidance document from the Centers for Disease Control and Prevention for two points: first, that it is possible for a person who has received COVID-19 vaccination to experience a breakthrough infection, and second, that unvaccinated persons who have previously been infected with the SARS-CoV-2 virus have "some degree of protection" against severe illness from their previous infection.

Neither point is new. When he issued his vaccination rule, the Secretary acknowledged that vaccinated persons could experience breakthrough infections, but he rationally concluded, on the basis of the evidence in the record before him, that his rule would nonetheless help to protect the health and safety of patients in Medicare- and Medicaid-funded health facilities. *See* Defs.' Mot. to Dismiss at 3-4, ECF No. 19. The Secretary also rationally explained his decision not to exempt persons with prior SARS-CoV-2 infections from the scope of his rule. *See id.* at 5-6. The Supreme Court has upheld the rational basis of these decisions. *See Biden v. Missouri*, 142 S. Ct. 647, 653-654 (2022).

Dated: August 18, 2022

Respectfully submitted,

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/s/ Joel McElvain
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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2022, I filed the foregoing Defendants' Response to Plaintiff's Notice of Supplemental Authority with the Clerk of the Court electronically via the Court's ECF system, which sent notification of such filing to counsel of record for all parties.

/s/ Joel McElvain
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